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Nos. 99-1072, 99-1244 and 99-1249

In the Supreme Court of the United States

CELPAGE, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

GTE SERVICE CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AT&T CORPORATION, ET AL., PETITIONERS

v.

CINCINNATI BELL TELEPHONE COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the universal-service provisions of 47 U.S.C. 254 (Supp. III 1997) violate the Taxing Clause or the Origination Clause or are void for vagueness.

2. Whether the Federal Communications Commission (FCC) reasonably determined that, under 47 U.S.C. 254(f) and 332(c)(3)(A) (Supp. III 1997), providers of commercial mobile radio services must contribute to state universal-service subsidies.

3. Whether the FCC may, consistent with the Takings Clause, adopt a forward-looking cost methodology to determine the proper level of federal universal-service subsidies.

4. Whether the FCC has statutory jurisdiction to consider a telecommunications carrier's intrastate revenues, as well as its interstate revenues, to determine the carrier's contribution to the federal universal-service program for schools, libraries, and rural health-care facilities.

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OPINIONS BELOW

The decision of the court of appeals (AT&T Pet. App. 1a-115a; Celpage Pet. App. 1-110; GTE Pet. App. 1a-98a) is reported at 183 F.3d 393. The Order of the Federal Communications Commission (excerpted in

AT&T App. 119a-249a; GTE App. 99a-150a) is reported at 12 F.C.C.R. 8776.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1999. Petitions for rehearing were denied on September 28, 1999 (AT&T Pet. App. 116a-118a). Celpage filed a petition for a writ of certiorari on December 23, 1999. AT&T and GTE filed petitions for a writ of certiorari on January 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Communications Act of 1934 (1934 Act), 47 U.S.C. 151 *et seq.*, as originally enacted, individual States generally regulated the rates and terms of local telephone service and the Federal Communications Commission (FCC) generally regulated the rates and terms of interstate long-distance service. 47 U.S.C. 152, 201; see *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). Initially, most of the rates set by the States and the FCC entitled local telephone companies, known as "local exchange carriers" or "LECs," to a reasonable rate of return based on prudently incurred historical costs.

Many components of the telephone network are used to provide both local and long-distance service. The costs associated with each component have traditionally been allocated between the interstate domain and the intrastate domain and recovered through rates set by the appropriate regulatory authority. *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); 47 U.S.C. 221(c). That allocation is known as the "separations" process. Costs allocated to the interstate domain are generally recovered by local exchange carriers through access charges imposed on long-distance carriers for the use of

the local network. Costs allocated to the intrastate domain are generally recovered through the rates that consumers pay for local service.

b. The 1934 Act required the FCC to regulate interstate communications "so as to make available, so far as possible, to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. 151 (1994 & Supp. III 1997). Without some type of direct or indirect financial assistance, some Americans could not afford telephone service. For people living in rural or isolated areas, for example, the cost of telephone service could be prohibitively high, because of the greater expense of installing telephone lines and the reduced economies of scale. Moreover, people with low incomes, regardless of where they live, might not be able to afford telephone service.

The FCC and the States established a variety of subsidy mechanisms to ensure affordable telephone service for all Americans, *i.e.*, "universal service." For example, the FCC modified the separations process for the smallest local exchange carriers (those with fewer than 50,000 lines) by allocating a greater-than-usual portion of traffic-sensitive switching costs to the interstate domain. That modification, by shifting more of those shared costs from local customers to long-distance customers, subsidized local rates. Other federal universal-service subsidies include the "Link-Up" and "Lifeline" programs, which reduce initial connection charges and monthly basic local service fees for low-income customers. See FCC C.A. Br. 9-13.

Many States, in turn, have required local exchange carriers to charge the same rate for service throughout their service areas, even though some parts of each

area may be more costly to serve than other parts. Such "geographic averaging" creates a subsidy from customers in low-cost areas to customers in high-cost areas. In addition, many States have set business rates at higher levels than residential rates, even though the cost of providing service to business and residential customers may be the same. Some States also have explicit subsidy programs to achieve universal service. See FCC C.A. Br. 11-12 & n.8.

The patchwork of implicit and explicit federal and state subsidies worked well, in the era of monopoly local telephone service, to ensure that affordable telephone service was available to virtually everyone. But that era was to come to an end.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, fundamentally changed the regulation of telecommunications. In the core "local competition" provisions of the 1996 Act, Congress established requirements and procedures designed to open local telephone markets to full competition. 47 U.S.C. 251, 252.[1] In particular, incumbent local exchange carriers were required to interconnect their networks with those of competing providers and to lease their network elements to those competing providers at nondiscriminatory cost-based rates. See 47 U.S.C. 251(c)(2) and (3), 252(d)(1).

Congress anticipated that such competition would cause the retail rates for local telephone service to move toward the carriers' forward-looking costs. Congress also anticipated that such a process would erode the implicit subsidies supporting universal service. For example, competition for customers who can be served

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[1] Citations in this brief of provisions of the 1996 Act are to Supplement III 1997.

at low cost—*e.g.*, customers in high-density areas—could be expected to reduce those customers' rates to close to cost. As a consequence, the implicit subsidies from those customers to customers in high-cost areas could be expected to diminish.

Congress addressed such concerns in 47 U.S.C. 254, titled "Universal service," which was designed to preserve and advance universal service in a competitive environment. Section 254 codified the FCC's policy of providing federal universal-service support for low-income consumers and consumers in high-cost areas. 47 U.S.C. 254(b)(3), (e) and (j). Section 254 also created a new program to provide discounted telecommunications and information services to schools, libraries, and rural health-care facilities. 47 U.S.C. 254(b)(6) and (h).

Congress directed that a Federal-State Joint Board be established, pursuant to 47 U.S.C. 410(c), to recommend changes to the FCC in federal universal-service policies. 47 U.S.C. 254(a)(1). The FCC, in turn, was directed to promulgate universal-service rules, "includ-[ing] a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation," by May 1997. 47 U.S.C. 254(a)(2).

Congress set forth several "principles" to guide the FCC and the Joint Board in that process. First, Congress stated that "[q]uality services should be available at just, reasonable, and affordable rates." 47 U.S.C. 254(b)(1). Second, Congress stated that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the nation." 47 U.S.C. 254(b)(2). Third, Congress stated that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas," should have access to telecommunications

and information services that are "reasonably comparable to those services provided in urban areas" and "at rates that are reasonably comparable" to those in urban areas. 47 U.S.C. 254(b)(3). Fourth, Congress stated that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. 254(b)(4). Fifth, Congress stated that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. 254(b)(5). And, finally, Congress stated that schools, libraries, and rural health-care facilities "should have access to advanced telecommunications services." 47 U.S.C. 254(b)(6).

3. In August 1996, the FCC adopted rules implementing the local-competition provisions of the 1996 Act. *In re Implementation of Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499 (1996). Among other things, the FCC established a pricing methodology, based on forward-looking economic costs, that state public utility commissions are to use in determining the prices that an incumbent local exchange carrier may charge competitors to lease the incumbent's network elements or to interconnect with the incumbent's network. The prices set under that methodology reflect the incumbent's long-run economic cost of providing network elements, assuming that the incumbent acts rationally to provide service in an efficient manner; those prices also reflect a reasonable share of the incumbent's joint and common costs, an economic rate of depreciation that reflects the true changes in economic value of an asset, and a reasonable return on investment that reflects the risks incurred by investors, including the risks of increased competition.

See *id.* at 15,848-15,849, 15,851-15,854, 15,856. The FCC explained that a pricing methodology based on forward-looking costs, which approximates prices in a competitive market, would encourage efficient competitive entry into traditionally monopolistic markets. *Id.* at 15,844.

The Eighth Circuit invalidated the FCC's pricing rules (along with certain other rules) on the ground that the 1996 Act gives state public utility commissions, not the FCC, general jurisdiction to interpret the pricing provisions of Sections 251 and 252. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 794-800 (8th Cir. 1997). This Court, however, reversed the Eighth Circuit's jurisdictional ruling, holding that the FCC has statutory authority to establish pricing standards. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 376-385 (1999). The Court remanded the case to the Eighth Circuit to address (among other things) the substantive validity of the FCC's pricing methodology based on forward-looking costs. *Id.* at 397. Those remand proceedings are pending.

4. In May 1997, the FCC released its initial order concerning implementation of the universal-service provisions of Section 254. See *In re Federal-State Joint Bd. on Universal Service*, 12 F.C.C.R. 8776 (1997) (*Universal Service Order*). The rules adopted in the *Universal Service Order*, which generally reflect the recommendations of the Federal-State Joint Board, address federal universal-service programs for low-income customers, for customers in high-cost areas (*e.g.*, rural or isolated areas), and for schools, libraries, and rural health-care facilities.

a. The FCC adopted rules regarding who must contribute to universal service, who may receive universal-service support, and which services are eligible for support. The FCC required all telecommuni-

cations carriers (as well as certain other providers of telecommunications services) to contribute to universal-service support in proportion to their share of end-user telecommunications revenues. *Universal Service Order*, 12 F.C.C.R. at 8797-8798 (AT&T Pet. App. 158a). The FCC rejected arguments that certain carriers, such as paging providers, should be exempted from the contribution requirement or permitted to make reduced contributions. *Id.* at 9188-9189. The FCC also rejected arguments that the federal preemption provisions of 47 U.S.C. 332(c)(3)(A) preclude States from requiring universal-service contributions from providers of commercial mobile radio services. 12 F.C.C.R. at 9181.

The FCC determined that federal universal-service subsidies would be available for telecommunications services, internal connections, and Internet access provided to eligible schools, libraries, and rural health-care facilities. *Universal Service Order*, 12 F.C.C.R. at 8794 (AT&T Pet. App. 152a). The FCC concluded that only telecommunications carriers could receive federal subsidies for providing telecommunications services to such entities. The FCC also concluded, however, that the 1996 Act did not prohibit, and public policy interests favored, permitting any provider, including a non-telecommunications carrier, to receive federal subsidies for providing internal connections or Internet access to such entities. *Id.* at 9086-9089.

b. The FCC determined that it had jurisdiction to calculate a carrier's federal universal-service contributions based on both its interstate (including international) revenues and its intrastate revenues. *Universal Service Order*, 12 F.C.C.R. at 9192- 9197 (AT&T Pet. App. 210a-221a). The FCC then decided that carriers' contributions to the universal-service program

for schools, libraries, and rural health-care providers should be assessed based on their intrastate as well as interstate revenues. The FCC reasoned that, because the States did not have programs to subsidize service to those entities, carriers could be required to contribute to the federal program based on their total revenues. *Id.* at 9203 (AT&T Pet. App. 231a-232a). In contrast, the FCC decided to determine carriers' contributions to the universal-service programs for low-income consumers and consumers in high-cost areas based solely on interstate revenues. *Id.* at 9200 (AT&T Pet. App. 226a).

The FCC separately decided, however, that carriers could *recover* their universal-service contributions for schools, libraries, and rural health-care providers only through their rates for interstate services. *Universal Service Order*, 12 F.C.C.R. at 9199 (AT&T Pet. App. 224a). The FCC explained that otherwise "carriers would recover the portion of their intrastate contributions attributable to intrastate services through increases in rates for basic residential dialtone service." *Id.* at 9203 (AT&T Pet. App. 232a).

c. The FCC determined that the amount of federal universal-service support for carriers providing service to high-cost areas should be based, in part, on the forward-looking economic costs of providing such service. *Universal Service Order*, 12 F.C.C.R. at 8899. The FCC explained that a methodology based on forward-looking costs would "send the correct signals for entry, investment, and innovation" and would thereby encourage efficient competitive market entry. *Ibid.* The FCC stated that forward-looking costs could be determined, at the State's election, based either on "state-conducted forward-looking economic cost studies approved by the Commission" or on "cost models devel-

oped by the Commission, in consultation with the Joint Board." *Ibid.*

The FCC stated that rural carriers serving high-cost areas would continue to receive federal universal-service support under the existing mechanisms until the FCC, working with the Joint Board, had an opportunity to develop a model that could reliably reflect such carriers' forward-looking costs. *Universal Service Order*, 12 F.C.C.R. at 8792-8793 (AT&T Pet. App. 148a-149a), 8935. The FCC noted that the various models that had been submitted for its consideration were not yet capable of doing so. *Id.* at 8909- 8910.

After the issuance of the *Universal Service Order*, the FCC implemented a multi-phase process to develop a model based on forward-looking costs to determine the amount of federal universal-service support for non-rural carriers serving high-cost areas. See *In re Federal-State Joint Bd. on Universal Service*, 12 F.C.C.R. 18,514 (1997) (Further Notice of Proposed Rulemaking). That process was completed in November 1999. See *In re Federal-State Joint Bd. on Universal Service*, CC Docket No. 96-45, FCC 99-306 (adopted Oct. 21, 1999) (Ninth Report and Order), appeal pending *sub nom. U.S. West* v. *FCC*, No. 99-9546 (10th Cir. filed Dec. 10, 1999); *In re Federal-State Joint Bd. on Universal Service*, CC Docket No. 96-45, FCC 99-304 (adopted Oct. 21, 1999) (Tenth Report and Order), appeal pending *sub nom. U.S West* v. *FCC*, No. 99-9547 (10th Cir. filed Dec. 10, 1999).

4. A number of parties challenged the *Universal Service Order*. Those challenges were consolidated in the Fifth Circuit, which affirmed in part and reversed

in part. GTE Pet. App. 1a-98a.[2] We discuss only those portions of the court's opinion that are challenged in the petitions for certiorari.

a. The court of appeals rejected Celpage's claim that Section 254, as applied to paging providers, violates the Origination Clause, U.S. Const. Art. I, § 7, Cl. 1, which requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." GTE Pet. App. 50a-52a. The court concluded that Section 254 is not a "Bill[] for raising Revenue," under the standard articulated in *United States* v. *Munoz-Flores*, 495 U.S. 385, 398 (1990). The court explained that "universal service contributions are part of a particular program supporting the expansion of, and increased access to, the public institutional telecommunications network"—a program from which "[e]ach paging carrier directly benefits" through the creation of "a larger and larger network." GTE Pet. App. 51a. The court reasoned that the design of the universal-service program, which "exact[s] payments from those companies benefiting from the provision of universal service," prevents those payments from being classified as "revenue" within the meaning of the Origination Clause. *Ibid.*

The court of appeals observed that Celpage had not raised a Taxing Clause claim in its initial brief. "Therefore," said the court, "we will not consider it." GTE Pet. App. 49a-50a.

The court of appeals also rejected Celpage's contention that the States' authority to assess universal-service contributions from providers of commercial mobile radio services (CMRS) is preempted by 47 U.S.C. 332(c)(3)(A), which states, in pertinent part, that

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[2] All citations of the Fifth Circuit's opinion will be to GTE's Appendix.

"no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service * * * except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." GTE Pet. App. 57a-62a. The court held that Section 332(c)(3)(A) bars States only from regulating the rates and entry of CMRS providers, not from requiring CMRS providers to contribute to state universal-service programs. GTE Pet. App. 60a-61a. The court explained that such a construction of Section 332(c)(3)(A) gives full effect to Section 254(f), which authorizes States to require universal-service contributions from "[e]very telecommunications carrier that provides intrastate telecommunications services." GTE Pet. App. 61a.

b. The court of appeals generally affirmed the FCC's determinations regarding federal universal-service support for carriers serving high-cost areas. The court, applying the methodology of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), determined that Section 254 is ambiguous as to whether the FCC may calculate such support based on carriers' forward-looking costs. The court concluded that the FCC's decision to use such a methodology was reasonable and, consequently, was permissible under *Chevron*. GTE Pet. App. 15a-17a. The court noted that this Court has consistently refused to foreclose ratemaking alternatives that could benefit consumers and investors, *id.* at 15a n.12 (quoting *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 316 (1989))—and, indeed, that the Court has upheld the use of similar cost models that were not based on historical costs, *ibid.* (citing *Mobil Oil Exploration & Producing*

S.E., Inc. v. *United Distrib. Cos.*, 498 U.S. 211, 224-225 n.5 (1991)).

The court of appeals rejected GTE's contention that the FCC's decision to use a methodology based on forward-looking costs violated the Takings Clause. The court explained that, under *Duquesne Light*, a party cannot successfully attack a cost methodology without showing that the methodology will produce an unreasonable rate. The court found that GTE had failed to make such a showing. GTE Pet. App. 19a n.14. Distinguishing *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396 (1920), the court observed that the FCC is not "requiring the [incumbent local exchange carriers] to remain open or to charge low rates." GTE Pet. App. 19a n.14.

c. Finally, the court of appeals held that the FCC lacked statutory jurisdiction to calculate carriers' universal-service contributions based on their intrastate revenues as well as their interstate revenues. GTE Pet. App. 92a-94a. The court stated that the FCC's exercise of such jurisdiction violated the "broad language" of Section 2(b) of the 1934 Act, 47 U.S.C. 152(b), which provides that, with certain exceptions, "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." GTE Pet. App. 92a-93a. The court concluded that "the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a 'charge . . . in connection with intrastate communication service'" within the meaning of that statute. *Id.* at 93a. The court further concluded that Section 254 was not a sufficiently unambiguous grant of

authority to the FCC to regulate intrastate matters to overcome Section 152(b). *Ibid.*

ARGUMENT

The claims raised by petitioners Celpage (in No. 99-1072) and GTE (in No. 99-1244) are without merit. We agree with petitioner AT&T (in No. 99-1249) that the court of appeals erred in prohibiting the FCC from including carriers' intrastate revenues in the assessment base for the federal universal-service programs for schools, libraries, and rural health-care facilities. But we did not ourselves seek certiorari because, on balance, we concluded that the court's decision on that issue is not so significant as to warrant this Court's review. We adhere to that judgment now. We therefore urge that all three petitions be denied.

1. a. Celpage principally contends (Pet. 12-21) that 47 U.S.C. 254, the universal-service provision of the 1996 Act, and the FCC's *Universal Service Order* violate the Taxing Clause, U.S. Const. Art I, § 8, because the universal-service assessments are a "tax" that may be imposed only by Congress, and not by the FCC. The court of appeals declined to reach that claim, however, because Celpage did not raise the claim in a timely manner. See GTE Pet. App. 49a-50a ("Celpage * * * does not raise a Taxing Clause claim until its reply brief. Therefore, we will not consider it."). The claim is therefore unsuited for the Court's consideration. See *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[3]

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[3] The court of appeals did not, as Celpage suggests (Pet. 12 n.15), excuse Celpage's failure to raise a timely Taxing Clause claim. The court merely observed in a footnote that, "[e]ven if

In any event, Celpage's Taxing Clause claim, even if properly presented, would not warrant review for two reasons. First, the universal-service assessments are not a tax, but a fee paid by members of the telecommunications industry to assure the availability of "[q]uality services" at "just, reasonable, and affordable rates" in "all regions of the Nation." 47 U.S.C. 254(b)(1) and (2). See *United States* v. *Munoz-Flores*, 495 U.S. 385, 399 (1990) (distinguishing, for Origination Clause purposes, between a tax provision and a "special assessment provision [that] was passed as part of a particular program to provide money for that program"). The Taxing Clause thus is not implicated here.

Second, even if the universal-service assessments could be categorized as a "tax," this Court has recognized that Congress may "delegate discretionary authority under its taxing power" to federal agencies. *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989). Such delegations are "subject to no constitutional scrutiny greater than that * * * applied to other nondelegation challenges." *Id.* at 223. Section 254 does not contravene ordinary non-delegation principles, because Congress did not leave the FCC without any "intelligible guidelines for [the universal-service] assessments." *Id.* at 224. In Section 254(b), Congress established a set of "universal service principles" to be applied by the FCC and the Joint Board. And, in Section 254(d), Congress made clear that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by

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Celpage's Taxing Clause argument were properly before us," the argument would lack merit. GTE Pet. App. 49a-50a n.52.

the Commission to preserve and advance universal service." See generally *Mistretta* v. *United States*, 488 U.S. 361, 373 (1989) (noting that this Court has upheld "without deviation" since 1935 "Congress' ability to delegate power under broad standards").

b. Celpage also contends (Pet. 19, 21) that Section 254 violates the Origination Clause, U.S. Const. Art. 1, § 7, Cl. 1, because the 1996 Act originated in the Senate, not the House of Representatives. As this Court has explained, however, "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 398. That is so even where the "assessments are not collected for the benefit of the payors" because "the beneficiaries of the bill are not relevant." *Id.* at 400.

Celpage nonetheless insists that an assessment must be considered the product of a "revenue bill" if no close relationship exists between the payors and beneficiaries. The court of appeals, which accepted Celpage's argument on that point (see GTE Pet. App. 52a n.56), found that such a relationship exists here. As the court explained, "Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service." *Id.* at 51a. Celpage and other paging carriers, as entities engaged in the business of providing telecommunications services, "directly benefit[] from [the] larger and larger network" that is created, in part, as a result of the universal-service program. *Ibid.*[4]

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[4] The court of appeals' rejection of the Origination Clause claim is not, as Celpage asserts (Pet. 18-19, 21), inconsistent with

Contrary to Celpage's suggestion, the mere fact that universal-service contributions are *reflected in the* federal budget does not mean that the contributions derive from a "Bill[] for raising Revenue." As the court of appeals observed, the relevant issue is not the nature of the government's "accounting designations," but "whether the funds are 'part of a particular program to provide money for that program.'" GTE Pet. App. 50a-51a (quoting *Munoz-Flores*, 495 U.S. at 399); see also *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 596 (1884). The universal-service contributions are part of such a program and, consequently, do not implicate the Origination Clause.[5]

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any decision of this Court. In *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), a statute expressly required the FCC to determine fees based, in part, on "the value to the recipient." *Id.* at 340. Section 254, in contrast, does not require the FCC to base a carrier's contributions to the universal-service program on the value of the benefits that the carrier receives from the program. Cf. *Skinner*, 490 U.S. at 224 (rejecting a broader constitutional reading of *National Cable Television*). In *Dane* v. *Jackson*, 256 U.S. 589 (1921), the Court did not distinguish between user fees and taxes, but instead considered whether a State's method of distributing income-tax collections violated the Takings Clause, which Celpage has not invoked. In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court confined its holding to the special considerations raised by the Export Clause. The Court distinguished, and left undisturbed, decisions arising under other constitutional provisions. See *id.* at 367-369. Nor is the court of appeals' decision in tension with *Thomas* v. *Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999). In that case, the D.C. Circuit assumed, without deciding, that a particular assessment was a tax rather than a fee (*id.* at 506), and then concluded that Congress had, in any event, authorized the agency to make the assessment (*id.* at 506-507).

[5] The Congressional Budget Office report cited by Celpage confirms that universal-service contributions are used only to

c. Celpage contends (Pet. 22, 26) that, because Section 254 "provides no guidance as to who must pay these universal service assessments, or the amount owed," "the entire statutory program is unconstitutionally vague." See Pet. iii (questions presented) (directing the vagueness challenge to "the Universal Service statute"). Celpage's vagueness claim, like its Taxing Clause claim, is inappropriate for the Court's review. Celpage raised no vagueness challenge to Section 254 below. The court of appeals consequently did not address any such challenge.[6]

Section 254 is not, moreover, unconstitutionally vague. As noted above, Congress articulated a set of "universal service principles," 47 U.S.C. 254(b), and directed the FCC to design a universal-service program consistent with those principles, 47 U.S.C. 254(a). In addition, Congress specifically provided that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. 254(d). The statute leaves no ambiguity as to whether Celpage, which indisputably provides "interstate telecommunications service," is required to make such contributions. That Congress left it to the FCC to fill in certain details—for example,

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support the universal-service program. The contributions are not treated as general revenues of the federal government. Celpage Pet. App. 142-143.

[6] The only vagueness challenge that the court of appeals identified was directed at the FCC's administrative procedures for assessing contributions. GTE Pet. App. 56a. The court did not identify or address any claim that Section 254 itself is unconstitutionally vague.

the precise services to receive universal-service support and the precise levels of support to be provided—does not render Section 254 unconstitutionally vague. It is well settled that Congress may leave statutory "gap[s] for the agency to fill." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Such gaps do not make a statute unconstitutional.

2. Celpage renews its claim (Pet. 26-30) that 47 U.S.C. 332(c)(3)(A) precludes States from requiring commercial mobile radio service (CMRS) providers to contribute to state universal-service programs.[7] That claim lacks merit. Such claims have been rejected by the D.C. Circuit and the Tenth Circuit as well as by the Fifth Circuit in this case. See *Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332 (D.C. Cir. 1999); *Sprint Spectrum* v. *State Corp. Comm'n*, 149 F.3d 1058 (10th Cir. 1998).

As the court of appeals explained (GTE Pet. App. 61a), the plain language of Section 332(c)(3)(A) precludes the States only from "regulat[ing] the entry of or the rates charged by" CMRS providers. It explicitly

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[7] Section 332(c)(3)(A) provides, in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates.

exempts from preemption other types of state regulation—*i.e.*, regulation of "the other terms and conditions of commercial mobile services," 47 U.S.C. 332(c)(3)(A)—including regulation requiring CMRS providers to contribute to state universal-service programs. Such a construction of Section 332(c)(3)(A) is, as the court of appeals recognized (GTE Pet. App. 61a), consistent with the unqualified mandate of Section 254(f) that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute" to state universal-service programs. See *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1336 (Section 254(f) "is strong support for the proposition" that States may require CMRS providers to contribute to universal service).

That construction does not, as Celpage contends (Pet. 29), render superfluous the second sentence of Section 332(c)(3)(A), which allows more extensive state regulation where commercial mobile services "are a substitute for land line telephone exchange service for a substantial portion of the communications within [a] State." 47 U.S.C. 332(c)(3)(A). As the court of appeals recognized (GTE Pet. App. 60a), that sentence simply "clarifies the ability of states to regulate rates and entry in the name of universal service" in certain circumstances; in contrast, "the 'other terms and conditions clause' [of the first sentence of Section 332(c)(3)(A)] opens the door to all other universal service regulation," whether or not the condition stated in the second sentence is satisfied.

3. GTE contends (Pet. 15-30) that the Takings Clause precludes the FCC's choice of a forward-looking cost methodology in determining the amount of federal universal-service support for carriers serving high-cost areas. GTE does not claim to have suffered any actual

taking. Instead, concerned that such carriers may not be as well compensated under a methodology based on forward-looking costs as under a methodology based on historical costs, GTE argues (Pet. 17, 19) that "the principle of constitutional avoidance" requires a "narrowing construction of the Act" that would prevent any consideration of forward-looking costs. The court of appeals correctly rejected that argument.[8]

GTE would be entitled to invoke the "principle of constitutional avoidance" in this context only if, among other things, the FCC's choice of a methodology based on forward-looking costs would necessarily subject incumbent local exchange carriers to regulatory takings in the future. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985) (declining to apply the principle of constitutional avoidance in the absence of any "identifiable set of instances in which [the regulatory action] will necessarily or even probably constitute a taking"). As this Court has explained, "[i]t is not theory, but the impact of the rate order which counts," because "[t]he Constitution protects the utility from the *net effect* of the rate order on its property." *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 314 (1989) (emphasis added) (quoting *FPC* v. *Hope*

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[8] GTE claims (Pet. 12) that the FCC's approach "assume[s] * * * a hypothetical, ideally efficient network." That is not entirely accurate. The FCC has explained that an appropriate model for determining forward-looking costs must take into account the location of an incumbent local exchange carrier's existing wire centers, see *Universal Service Order*, 12 F.C.C.R. at 8913, even though a "hypothetical, ideally efficient" carrier might have arranged those wire centers differently. As the court of appeals recognized (GTE Pet. App. 18a), the FCC "departed from its general 'most efficient' methodology" in ways that benefit GTE and other incumbent local exchange carriers.

Natural Gas Co., 320 U.S. 591, 602 (1944)); accord *id.* at 317 (Scalia, J., concurring). Accordingly, "[i]f the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end." *Id.* at 310. "The fact that the method employed to reach that result may contain infirmities is not then important." *Ibid.*

There is no reason to assume that the FCC's forward-looking cost methodology will produce confiscatory results in any context. A local exchange carrier's costs, rates, and ultimate profits are not determined by the FCC alone. It is the State, and not the FCC, that requires a carrier to serve customers in high-cost areas. It is likewise the State, not the FCC, that determines the rates that the carrier may charge its customers. See *Universal Service Order*, 12 F.C.C.R. at 8785 ("The Commission * * * does not have control over the local rate-setting process."); 47 U.S.C. 152(b). And the States have traditionally borne a large share of the responsibility for universal-service support for carriers serving high-cost areas. The dispute presented here concerns only the FCC's choice of methodology for determining the federal share of such support. GTE fails to explain how the FCC's choice of one methodology over another would trigger a chain of events that would necessarily cause the States to take measures that would have confiscatory results for local exchange carriers.[9]

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[9] Even considered in isolation, the FCC's choice of a methodology based on forward-looking costs may not, in application, necessarily disadvantage local exchange carriers at all, much less threaten to constitute a taking. GTE does not attempt to demonstrate that the FCC's new methodology, which was finalized after the *Universal Service Order* at issue here, will cause GTE's affiliates to receive a smaller amount of explicit federal

Moreover, even if, contrary to *Duquesne*, a regulator's general methodology for setting rates could be a proper subject of a Takings Clause challenge, GTE's challenge still would fail. As this Court has noted, "[a]t one time, it was thought that the Constitution *required* rates to be set according to the actual present value of the assets employed in the public service," an approach that "mimics the operation of the competitive market." *Duquesne*, 488 U.S. at 308 (emphasis added) (citing *Smyth* v. *Ames*, 169 U.S. 466 (1898)). That approach is similar to the FCC's approach here. Although this Court ultimately determined that such a "fair value" approach is not constitutionally required, that approach has always been a permissible form of ratemaking, which has the salutary effect of "giv[ing] utilities strong incentive to manage their affairs well and to provide efficient service to the public." *Id.* at 309. The courts have routinely upheld ratemaking orders that denied a utility full recovery of its historical costs. See, *e.g.*, *id.* at 312-314 (denying a utility the recovery of prudently incurred historical expenditures); *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 224- 225 & n.5 (1991); *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 553-554, 564-568 (1945).[10]

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universal-service support than they received under the prior methodology based on historical costs.

[10] GTE argues (Pet. 16) that *Duquesne* holds that "when methodologies are changed, the end result of the new system must still * * * provide an adequate rate of return on the full investment as measured under the old system." No such issue was presented in *Duquesne*. Instead, the Court, after observing that "*[a]t all relevant times*, Pennsylvania's rate system has been predominantly but not entirely based on historical cost," found that "it has not been shown that the rate orders as modified * * * fail

GTE erroneously contends that the court of appeals' approval of the FCC's methodology is inconsistent with *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396 (1920), which GTE invokes for the proposition that courts must constitutionally scrutinize the rates for each aspect of a utility's operations. That proposition is inconsistent with the rule—adopted in *Hope Natural Gas* and reaffirmed in *Duquesne*—that the appropriate constitutional inquiry begins and ends with "the total effect of the rate order." *Duquesne*, 488 U.S. at 310; *Hope Natural Gas*, 320 U.S. at 602; see *In re Valuation Proceedings Under §§ 303(c) and 306 of the Regional*

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to give a reasonable rate of return on equity given the risks *under such a regime*." 488 U.S. at 315 (emphases added). The Court also emphasized that "[t]he adoption of a single theory of valuation as a constitutional requirement would be inconsistent" with long-standing precedent. *Id.* at 316.

GTE also invokes (Pet. 15-16) the Court's observation in *Duquesne* that "a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions." 488 U.S. at 315. But the FCC has not "switch[ed] back and forth between methodologies." Nor did the FCC act "arbitrarily" in adopting a methodology based on forward-looking costs, which the FCC concluded was necessary given Congress's decision in the 1996 Act to open local telecommunications markets to competition. Moreover, although the new methodology requires incumbent local exchange carriers to bear "the risk of bad investments" (just as they did under a historical cost methodology, which typically excludes costs that were not prudently incurred, see, *e.g.*, *NEPCO Mun. Rate Comm.* v. *FERC*, 668 F.2d 1327, 1332-1333 (D.C. Cir. 1981)), the new methodology does not deny such carriers "the benefit of good investments." It merely gives carriers an incentive to operate efficiently to ensure a reasonable profit. See *Universal Service Order*, 12 F.C.C.R. at 8899-8901, 8913-8914.

Rail Reorganization Act, 439 F. Supp. 1351, 1357 n.12 (Spec. Court 1977) (Friendly, J.) (observing that *Brooks-Scanlon*'s statement that "a carrier cannot be compelled to carry on even a branch of business at a loss," 251 U.S. at 399, "is not the law").[11] GTE's reliance on *Brooks-Scanlon* also is unavailing for the additional reasons identified by the court of appeals. See GTE Pet. App. 19a n.14 ("Unlike the situation in *Brooks-Scanlon*, the circumstance here is that the regulatory entity setting the rules, the FCC, is not requiring the [incumbent local exchange carriers] to remain open or to charge low rates, thereby forcing them to operate at a permanent loss.").

Finally, GTE asserts (Pet. 25-26) that the decision of the Fifth Circuit, in deferring to the FCC's implementation of Section 254, conflicts with decisions of other circuits that have declined to defer to agency action that raised grave constitutional concerns. This case is readily distinguishable because, as the Fifth Circuit recognized, the *Universal Service Order* presents no such concerns. As this Court observed in *Hope Natural Gas*, an agency's "order does not become suspect by reason of the fact that it is challenged." 320

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[11] In any event, GTE's argument proves too much. Historically, state regulators allowed local exchange carriers to charge some customers for intrastate service at rates far above cost so that the carriers could charge other customers at rates below cost. The implication of GTE's argument is that the traditional system, which is only now being phased out, is pervasively unconstitutional. Although GTE argues (Pet. 22-23) that competition is altering the constitutional analysis by eroding the protected status of incumbent local exchange carriers as regulated monopolies, such arguments are properly presented to the States, which decide which intrastate carriers must serve which customers and at which rates.

U.S. at 602. Indeed, the order, as "the product of expert judgment," "carries a presumption of validity." *Ibid.*

In sum, the court of appeals' disposition of GTE's Takings Clause claim is correct and does not conflict with any decision of this Court or any other court of appeals. The petition therefore raises no issue that warrants the Court's review. GTE requests that, at a minimum, its petition be held pending the Eighth Circuit's decision on remand in *Iowa Utilities Board*. In that case, GTE and other incumbent local exchange carriers have challenged, on Takings Clause and other grounds, the FCC's adoption of a methodology based on forward-looking costs to determine carrier-to-carrier rates under Sections 251 and 252 for interconnection and unbundled access to an incumbent's network elements. If the Eighth Circuit were to rule in GTE's favor, *that* case would warrant this Court's review, because invalidation of the FCC's pricing rules implementing Sections 251 and 252 would cause disarray in the telecommunications industry.[12] If the Eighth Circuit were to rule for GTE on the takings issue before the date on which this Court would otherwise act on the petitions in this case, GTE's petition in

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[12] Before this Court issued its decision in *Iowa Utilities Board*, the Eighth Circuit stayed the FCC's pricing rules for interconnection and unbundled access. While the stay was in effect, the vast majority of state commissions independently implemented the pricing provisions of Sections 251 and 252 by adopting a forward-looking cost methodology in that context. The federal courts have consistently upheld that choice of methodology, rejecting claims that the methodology violates the Takings Clause. See, *e.g.*, *GTE South Inc.* v. *Morrison*, 6 F. Supp. 2d 517, 526-530 (E.D. Va. 1998), aff'd on other grounds, 199 F.3d 733 (4th Cir. 1999); *Southwestern Bell Tel. Co.* v. *AT&T Communications*, No. A97-CA-13255, 1998 WL 657717, at *10-*13 (W.D. Tex. Aug. 31, 1998).

this case might appropriately be held pending this Court's review of the Eighth Circuit's decision. But there is no reason to suppose that the Eighth Circuit will rule in GTE's favor, much less that the Eighth Circuit will do so based on the Takings Clause. The mere possibility of a future circuit conflict is insufficient to justify holding a petition in a case that does not warrant plenary review. For that reason, we submit that the Court should deny GTE's petition outright if, by the time this Court considers the petition, the Eighth Circuit has not ruled in GTE's favor on its takings claim.

4. AT&T challenges (Pet. 13-23) the court of appeals' holding that the FCC lacks jurisdiction to include a carrier's intrastate revenues (together with its interstate revenues) in the assessment base used to determine its contribution to the universal-service program for schools, libraries, and rural health-care facilities. We agree that the holding is incorrect, essentially for the reasons stated in AT&T's petition. In *Iowa Utilities Board*, this Court held that, under 47 U.S.C. 201(b), the FCC's regulatory jurisdiction embraces the substantive scope of the Communications Act, including the provisions added in 1996, even where the Act expressly grants concurrent jurisdiction to the States. See 525 U.S. at 377-380. Here, in including intrastate revenues in the assessment base, the FCC was implementing Section 254, which authorizes the FCC, after consultation with the Federal-State Joint Board, to define the scope of universal service, see 47 U.S.C. 254(c), and requires contributions to universal service to be made by all telecommunications providers, both interstate and intrastate, see 47 U.S.C. 254(b)(5), (d) and (f). Universal service has always focused on ensuring affordable *local* telephone service for customers

who have low incomes or who live in high-cost areas. There is thus no meaningful respect in which Section 254 could be said not to "apply" to intrastate matters. Under *Iowa Utilities Board*, the FCC has jurisdiction to implement Section 254 by establishing an effective universal-service program, without regard to the formal "interstate" or "intrastate" character of the matters being regulated.

Nonetheless, we concluded that the Fifth Circuit's jurisdictional error does not present a question of national significance that warrants this Court's intervention. Strictly construed, the court's jurisdictional *holding* is confined to a determination that the FCC may not include intrastate revenues in its assessment base for the universal-service programs for schools, libraries, and rural health-care facilities. The court did not consider whether the FCC had jurisdiction to do so with respect to the other universal-service programs—*i.e.*, the programs for low-income consumers and high-cost consumers—because the FCC had determined not to include intrastate revenues in the assessment bases for those programs. See AT&T Pet. App. 226a. The court's holding disadvantages carriers, such as AT&T, that provide predominantly interstate services. But the court's decision does not clearly purport to divide universal service into discrete interstate and intrastate spheres and to preclude the FCC from exercising any jurisdiction in the latter.

Indeed, as AT&T observes (Pet. 19), any such categorical division would be untenable, because Congress did not intend to strip the FCC of its longstanding authority to assist in subsidizing universal service, which, as noted, has traditionally focused on the provision of affordable local telephone service. Unlike AT&T (see Pet. 21), we do not read the decision below

to hold otherwise. Despite isolated language suggesting that the FCC may lack the authority "to fund intrastate universal services" (GTE Pet. App. 94a), the court of appeals separately affirmed that the FCC may use federal universal-service contributions to subsidize intrastate services, even where the FCC is not required to do so, and that the FCC may attach conditions to such contributions (GTE Pet. App. 87a). To be sure, in other portions of the opinion not directly challenged here, the court compounded its error by invalidating additional FCC rules on jurisdictional grounds. See, *e.g.*, GTE Pet. App. 36a-44a (no-disconnect rule).[13] In our view, however, the court's jurisdictional analysis is sufficiently unclear that it is unlikely to have appreciable persuasive force beyond this case. So limited, the court's decision does not threaten the basic integrity of the federal government's universal-service programs. If the decision is given broader significance, however, this Court's intervention may become necessary.

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[13] Although AT&T blames "the Fifth Circuit's sweeping 'jurisdictional' rulings" (Pet. 20) for the invalidation of FCC rules governing a carrier's eligibility for universal-service support, the Fifth Circuit purported not to "reach the states' jurisdictional challenges" on that point (GTE Pet. App. 29a), ostensibly basing its decision on the text of 47 U.S.C. 214(e)(2). But see GTE Pet. App. 30a n.32 (citing 47 U.S.C. 152(b)).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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